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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 WAYNE PARKS,) Civil No. 09-2719-WQH(WVG)
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12) Petitioner,) REPORT AND RECOMMENDATION
13) v.) GRANTING RESPONDENT'S MOTION
14) TO DISMISS (11-1)
15) MATTHEW CATE, Secretary of the)
16) California Department of)
17) Corrections and Rehabilitation,)
18) Respondent.)
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29 Wayne Parks ("Petitioner"), a state prisoner proceeding *pro*
30 se, has filed a Petition For Writ of Habeas Corpus pursuant to 28
31 U.S.C. §2254. Respondent has filed a Motion to Dismiss the Petition.
32 Petitioner has filed a "Memorandum of Points and Authorities In
33 Support of the Motion to Grant The Petition For Writ of Habeas
34 Corpus As Timeliness Filed," which the Court construes as an
35 Opposition to the Motion to Dismiss. The Court, having reviewed
36 Petitioner's Petition, Respondent's Motion to Dismiss, Plaintiff's
37 Opposition, and the lodgments presented therewith, finds that
38 Petitioner's Petition is barred by the statute of limitations.
39 Therefore, the Court RECOMMENDS that Respondent's Motion to Dismiss
40 be GRANTED.

I

PROCEDURAL HISTORY

On April 20, 2001, a jury convicted Petitioner of two counts of lewd and lascivious conduct with a minor under the age of 14 years, in violation of California Penal Code §288(a) and one count of sending harmful matter with intent to seduce a minor, in violation of California Penal Code §288.2(a). (Respondent's Lodgment No. 1 at 46-48). The court sentenced Petitioner to ten years and eight months in prison. (Respondent's Lodgment No. 1 at 200).

On January 17, 2002, Petitioner appealed his convictions in the California Court of Appeal. (Respondent's Lodgment No. 2). On May 31, 2002, the California Court of Appeal denied Petitioner's appeal. (Respondent's Lodgment No. 5).

On July 12, 2002, Petitioner filed a Petition for Review in the California Supreme Court. (Respondent's Lodgment No. 6). On August 14, 2002, the Petition for Review was denied. (Respondent's Lodgment No. 6).

On May 22, 2003, Petitioner constructively^{1/} filed a Petition For Writ Of Habeas Corpus in the California Supreme Court. (Respondent's Lodgment No. 8). On January 22, 2004, the California Supreme Court denied the Petition. (Respondent's Lodgment No. 9).

On February 4, 2009, Petitioner filed a Petition For Writ Of Habeas Corpus with the San Diego Superior Court. (Respondent's Lodgment No. 10). On April 13, 2009, the Superior Court denied the Petition. (Respondent's Lodgment No. 11).

^{1/} The Court gives Petitioner the benefit of the "mailbox rule" which deems that a petition is constructively filed when it is delivered to prison officials for filing. Houston v. Lack 487 U.S. 266(1988).

1 On November 14, 2009, Petitioner filed a second Petition for
2 Writ of Habeas Corpus in the California Supreme Court. (Respondent's
3 Lodgment No. 12). On January 13, 2010, the Petition was denied.
4 (Respondent's Lodgment No. 13).

5 On January 22, 2010, Petitioner filed a second Petition for
6 Writ of Habeas Corpus in the San Diego Superior Court. (Respondent's
7 Lodgment No. 14). On April 21, 2010, the San Diego Superior Court
8 denied Petitioner's second Petition for Writ of Habeas Corpus.
9 (Respondent's Lodgment No. 15).

10 On May 7, 2009, Petitioner filed a Petition For Writ Of
11 Habeas Corpus in the United States District Court, Eastern District
12 of California. (Respondent's Lodgment No. 16). On December 15, 2009,
13 the Eastern District transferred the action filed in that district
14 to the United States District Court, Southern District of California
15 [case no. 09-2824-BTM(CAB)]. On January 21, 2010, the District Judge
16 assigned to that case dismissed the Petition. (Respondent's Lodgment
17 No. 16).

18 On December 3, 2009, Petitioner filed the Petition for Writ
19 of Habeas Corpus that is now before this Court.

20 II

21 PETITIONER'S PETITION IS BARRED

22 BY THE STATUTE OF LIMITATIONS

23 1. The AEDPA's One-Year Statute of Limitations

24 Respondent argues that the Petition is barred by the
25 Antiterrorism and Effective Death Penalty Act's ("the AEDPA")
26 statute of limitations. The provisions of the AEDPA apply to
27 petitions for writs of habeas corpus filed in federal court after
28 the AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521

1 U.S. 320, 117 S. Ct. 2059, 2068 (1997). Therefore, because the
2 Petition was filed on December 3, 2009, the AEDPA applies to this
3 case.

4 Prior to the enactment of the AEDPA on April 24, 1996, "state
5 prisoners had almost unfettered discretion in deciding when to file
6 a federal habeas petition." Calderon v. United States Dist. Court
7 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), cert. denied, 118
8 U.S. 897 (1998), *overruled on other grounds by* Calderon v. United
9 States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998).
10 "[D]elays of more than a decade did not necessarily bar a prisoner
11 from seeking relief." Id.

12 With enactment of the AEDPA, a state prisoner's time frame
13 for seeking federal habeas relief was dramatically limited. The
14 AEDPA amended 28 U.S.C. § 2244 by, in part, adding subdivision (d),
15 which provides for a one-year limitation period for state prisoners
16 to file habeas corpus petitions in federal court. Section 2244(d)
17 states, in pertinent part:

18 (d)(1) A 1-year period of limitation shall apply to an
19 application for a writ of habeas corpus by a person in
20 custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of -

21 (A) the date on which the judgment became
22 final by the conclusion of direct review
23 or the expiration of the time for seeking
such review;

24 (B) the date on which the impediment to
filing an application created by State
25 action in violation of the Constitution or
26 laws of the United States is removed, if
the applicant was prevented from filing by
such State action;

27 (C) the date on which the constitutional
28 right asserted was initially recognized by
the Supreme Court, if the right has been
newly recognized by the Supreme Court and

1 made retroactively applicable to cases on
2 collateral review; or

3 (D) the date on which the factual predi-
4 cate of the claim or claims presented could
5 have been discovered through the exercise
6 of due diligence.

7 (2) The time during which a properly filed applica-
8 tion for State post-conviction or other collateral
9 review with respect to the pertinent judgment or claim
10 is pending shall not be counted toward any period of
11 limitation under this subsection.

12 28 U.S.C.A. § 2244(d)

13 On August 14, 2002, the California Supreme Court affirmed
14 Petitioner's convictions and sentence. Petitioner's convictions and
15 sentence became final on November 12, 2002, 90 days after Petitioner
16 could have filed a petition for writ of *certiorari* in the United
17 States Supreme Court. Wixom v. Washington, 264 F.3d 894, 897 (9th
18 Cir. 2001).

19 Therefore, absent tolling, Petitioner had one year or until
20 November 12, 2003, to file his Petition For Writ of Habeas Corpus
21 with this Court. However, as explained in detail below, Petitioner
22 waited over six years to file the Petition that is now before the
23 Court, thus making it untimely and barred by the statute of
24 limitations.

25 Petitioner filed several petitions for post-conviction relief
26 in the California Superior and Supreme Courts. The statute of
27 limitations is tolled while a "properly filed" state habeas corpus
28 petition is "pending" in the state court. Under the holding of Nino
 v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), the "statute of
 limitations is tolled from the time the first state habeas petition
 is filed until the California Supreme Court rejects petitioner's
 final collateral challenge," provided the petitions were properly

1 filed and pending during that entire time. The statute of
2 limitations is not tolled from the time a final decision is issued
3 on direct state appeal and the time the first state collat-
4 eral challenge is filed because there is no case "pending" during
5 that interval. Nino, 183 F.3d at 1006

6 The meaning of the terms "properly filed" and "pending" in
7 Nino have been clarified by the United States Supreme Court. In
8 Carey v. Saffold, 536 U.S. 214 (2002), the Court held that the time
9 between denial in a lower California court and the filing of a
10 subsequent petition in the next higher court does not toll the
11 statute of limitations, if the petition is ultimately found to be
12 untimely. Id. at 223-226. In Pace v. DiGuglielmo, 544 U.S. 408
13 (2005), the Court held that statutory tolling is not available for
14 the period a petition is under consideration, if it is dismissed as
15 untimely. Id. at 413

16 While statutory tolling may be available for intervals
17 between ascending filings (ie. from Superior Court, to the Court of
18 Appeal, to the Supreme Court), it is not available for the interval
19 between descending filings, unless a petitioner is attempting to
20 remedy a deficiency in the new filing. King v. Roe, 340 F.3d 821,
21 823 (9th Cir. 2003) *abrogated on other grounds* by Evans v. Chavis,
22 546 U.S. 189 (2006); Delhomme v. Ramirez, 340 F. 3d 817, n. 3 (9th
23 Cir. 2003). Statutory tolling is similarly unavailable for the
24 interval between successive filings in the same court. Dils v.
25 Small, 260 F.3d 984, 986 (9th Cir. 2001); Purifoy v. Cullen, 2010 WL
26 4181169 at *3 (C.D. Cal. 2010); Camacho v. Hernandez, 2009 WL 192483
27 at *4 (S.D. Cal. 2009).

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1 Petitioner's first petition for relief after his convictions
2 and sentence became final was filed on May 22, 2003 in the Califor-
3 nia Supreme Court. On January 22, 2004, the California Supreme Court
4 denied the Petition. From November 12, 2002 (the date Petitioner's
5 convictions and sentence became final) to May 22, 2003, (the date
6 Petitioner filed a Petition for Writ of Habeas Corpus in the
7 California Supreme Court) (**6 months, 10 days**), the statute of
8 limitations was **not tolled** because there was no case pending during
9 that interval. Nino 183 F.3d at 1006

10 From May 22, 2003 (the date Petitioner filed a Petition for
11 Writ of Habeas Corpus in the California Supreme Court) to January
12 22, 2004 (the date the California Supreme Court denied the Petition)
13 (**8 months**), the statute of limitations was tolled because Petitioner
14 was properly pursuing his state court remedies.

15 Thereafter, on February 4, 2009, Petitioner filed a Petition
16 for Writ of Habeas Corpus in the San Diego Superior Court. On April
17 13, 2009, the San Diego Superior Court denied the Petition.

18 From January 22, 2004 (the date the California Supreme Court
19 denied Petitioner's Petition for Writ of Habeas Corpus) to February
20 4, 2009 (the date Petitioner filed a Petition for Writ of Habeas
21 Corpus with the San Diego Superior Court) (**5 years, 13 days**), the
22 statute of limitations was **not tolled** because statutory tolling is
23 unavailable for intervals between descending filings. King 340 F.3d
24 at 823.

25 Thereafter, on November 14, 2009, Petitioner filed a second
26 successive Petition for Writ of Habeas Corpus in the California
27 Supreme Court. On January 13, 2010, the California Supreme Court
28 denied the Petition.

On January 22, 2010, Petitioner filed a second successive Petition for Writ of Habeas Corpus in the San Diego Superior Court. On April 21, 2010, the Petition was denied.

From April 13, 2009 (the date of the Superior Court's denial of Petitioner's first Petition for Writ of Habeas Corpus) to April 21, 2010 (the date of the Superior Court's denial of Petitioner's second Petition for Writ of Habeas Corpus)(**1 year, 8 days**), the statute of limitations was **not tolled** because statutory tolling is not available for intervals when a petitioner is pursuing relief on successive filings. Dils, 260 F.3d at 986; Purifoy, at *3; Camacho, at *4.

While applications for state post-conviction relief or other collateral review may toll the statute of limitations, that is, pause the statute of limitations clock, tolling does not restart the statute of limitations period. Ferguson v. Palmateer, 321 F.3d 802, 832 (9th Cir. 2003). Adding together the three periods of time when the statute of limitations was not tolled (**6 months, 10 days + 5 years, 13 days + 1 year, 8 days**), results in a total of approximately six years and seven months, which is well beyond the one year statute of limitations mandated by 28 U.S.C. § 2244(d)(1)(A). Accordingly, Petitioner failed to file his Petition for Writ of Habeas Corpus in a timely fashion and it is therefore barred.

2. Petitioner is Not Entitled to Equitable Tolling of the Statute of Limitations

Petitioner argues that he is entitled to equitable tolling of the statute of limitations because he has been diligent "to conform by the way of Collateral review until 2009 when (he) filed his Postconviction/Habeas Corpus." (Opposition at 2). Respondent argues

1 that Petitioner is not entitled to equitable tolling of the statute
2 of limitations.

3 The one-year statute of limitations is subject to equitable
4 tolling. Calderon, 128 F.3d at 1288. Equitable tolling of the
5 statute of limitations is appropriate where a habeas petitioner
6 shows: (1) that he has been pursuing his rights diligently, and (2)
7 that some extraordinary circumstance stood in his way. Pace, 544
8 U.S. at 418; Espinoza-Matthews v. California, 432 F.3d 1021, 1026
9 (9th Cir. 2005). The burden of demonstrating grounds warranting
10 equitable tolling rests with the petitioner. Pace, 544 U.S. at 418.
11 The obligation to act diligently "does not pertain solely to the
12 filing of the federal habeas petition, rather it is an obligation
13 that exists during the period appellant is exhausting state court
14 remedies as well." Roy v. Lampert, 465 F.3d 964, 972 (9th Cir. 2006)
15 citing Lacava v. Kyler, 398 F.3d 271, 277 (3rd Cir. 2005). When
16 courts assess a habeas petitioner's argument in favor of equitable
17 tolling, they must conduct a "highly fact-dependent" inquiry.
18 Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000), Lott v.
19 Mueller, 304 F.3d 918, 923 (9th Cir. 2002). The extraordinary
20 circumstances must be the "but-for and proximate cause" of the
21 untimely filing. Allen v. Lewis, 255 F.3d 798, 800 (9th Cir. 2001).

22 In this case, Petitioner alleges that in 2002, prison
23 authorities "seized all of the Petitioner property including State
24 Post conviction/Habeas Corpus," and that "(after) 6 years," prison
25 authorities "return Petitioner State Postconviction Nov. 2008."
26 (Opposition at 2).

27 However, Petitioner's allegations are belied by the state
28 court record presented by Respondent. The state court record

1 indicates that from January 2002 through May 2003, Petitioner filed
2 in the California courts at least three applications for relief.
3 (Respondent's Lodgments Nos. 2, 6, 8). Therefore, even if Peti-
4 tioner's allegations regarding the seizure of his property were
5 true, he still was able to file applications for relief in the
6 California courts.

7 Moreover, Petitioner does not explain what property was
8 seized from him nor how the lack of that property hindered the
9 diligent pursuit of his state court remedies. Further, Petitioner
10 does not explain what, if anything, he did to obtain his property
11 after it was seized. Additionally, Petitioner did not seek relief
12 from this Court to have Respondent provide him with his legal
13 materials, if in fact those materials were seized from him. In other
14 words, Petitioner does not provide a valid reason why he waited from
15 2004, after the denial of his first Petition for Writ of Habeas
16 Corpus by the California Supreme Court, to 2009 before continuing
17 with any further state collateral action, or why he waited from 2004
18 to 2009 to file the Petition now before the Court. Under these
19 circumstances, the Court can not conclude that Petitioner was
20 diligently pursuing his rights or that some extraordinary circum-
21 stance stood in his way of timely filing the Petition that is before
22 the Court.

23 Therefore, the Court finds that Petitioner has failed to
24 establish that he is entitled to equitable tolling of the statute of
25 limitations. Accordingly, the Court declines to equitably toll the
26 statute of limitations and finds that his Petition for Writ of
27 Habeas Corpus filed in this Court is untimely.

28

III

CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the Court has determined that Petitioner has failed to comply with the AEDPA's statute of limitations and that he is not entitled to equitable tolling of the statute of limitations. 28 U.S.C.A. § 2244(d).

Accordingly, the Court RECOMMENDS that Respondent's Motion to Dismiss is GRANTED.

This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than February 4, 2011, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

1 **IT IS FURTHER ORDERED** that any reply to the objections shall
2 be filed with the Court and served on all parties no later than
3 February 18, 2011. The parties are advised that failure to file
4 objections within the specified time may waive the right to raise
5 those objections on appeal of the Court's order. Martinez v. Ylst,
6 951 F.2d 1153 (9th Cir. 1991).

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12 DATED: January 5, 2011

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15 Hon. William V. Gallo
16 U.S. Magistrate Judge
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